Supreme Court, U.S.
FILED
MAR 2 7 2004
OFFICE OF THE CLERK

No. 03-1076

IN THE

Supreme Court of the United States

October Term, 2003

ASTON B. WILLIAMS, M.D.,

Petitioner,

vs.

JOSEPH MADDI, OLIVIA BLACKWELL, THOMAS A. HASSENFRATZ, JOSEPH SERGHANY and SHEEHAN MEMORIAL HOSPITAL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FOURTH JUDICIAL DEPARTMENT.

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID P. MARCUS, ESQ.
Counsel of Record
WEBSTER SZANYI, LLP
Attorneys for Respondent Joseph Serghany
1400 Liberty Building
Buffalo, New York 14202
Telephone: (716) 842-2800

FELDMAN, KIEFFER & HERMAN, LLP
MICHELE K. SNYDER, ESQ.
Attorneys for Respondent Thomas A. Hassenfratz
110 Pearl Street, Suite 400
Buffalo, New York 14202
Telephone: (716) 852-5875

DAMON & MOREY LLP
JUDY S. HERNANDEZ, ESQ.
Attorneys for Respondents Joseph Maddi, Olivia Blackwell and Sheehan Memorial Hospital
1000 Cathedral Place
298 Main Street
Buffalo, New York 14202
Telephone: (716) 856-5500

BATAVIA LEGAL PRINTING, INC.—Telephone (866) 768-2100

QUESTIONS PRESENTED

1. WHETHER THIS CASE MEETS THE CRITERIA FOR REVIEW.

2. WHETHER THE NEW YORK STATE APPELLATE DIVISION'S DETERMINATION AFFIRMING DISMISSAL OF PETITIONER'S CASE IS CONSISTENT WITH FEDERAL LAW.

3. WHETHER PETITIONER'S MOTION FOR FURTHER DISCOVERY WAS PROPERLY DENIED BY THE APPELLATE DIVISION AND TRIAL COURT BELOW.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The Petitioner in this case is Aston B. Williams, M.D. The Respondents are Joseph Maddi, Olivia Blackwell, Thomas A. Hassenfratz, Joseph Serghany and Sheehan Memorial Hospital.

Pursuant to Supreme Court Rule 29.6, the Respondents state that Sheehan Memorial Hospital ("SMH") is a domestic not-for-profit corporation. SMH has no parent and issues no stock. SMH is not affiliated with any entity that is publicly held.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

ARGUMENT 6

POINT I NEITHER THE RECORD NOR THE DECISION BELOW RAISES THE QUESTIONS PRESENTED IN THE PETITION 6

POINT II PETITIONER'S BRIEF CONTAINS MISSTATEMENTS OF FACT BASED ON WHOLLY UNSUPPORTED CONJECTURE AND SPECULATION 11

1. PETITIONER'S LAWSUIT IS BASED ON RECKLESS AND UNSUPPORTED CLAIMS OF CONSPIRATORIAL CONDUCT BY RESPONDENTS AND OTHERS 11

2. CLAIMS OF DISCRIMINATORY TREATMENT AGAINST OTHER PHYSICIANS ARE UNSUPPORTED BY ANY EVIDENCE 12

Page

3. PETITIONER'S CLAIM THAT THE EDUCATIONAL LETTER WAS THE RESULT OF CONSPIRATORIAL CONDUCT IS WITHOUT MERIT 14

POINT III PETITIONER'S MOTION FOR FURTHER DISCOVERY WAS PROPERLY DENIED BY THE APPELLATE DIVISION AND TRIAL COURT BELOW 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

Alcena v. Raine, 692 F.Supp. 261 (S.D.N.Y. 1988) ... 7

American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 119 S. Ct. 977 (1999) 7

Angola v. Civiletti, 666 F.2d 1 (2d Cir. 1981) 8,9

Cardio-Medical Associates v. Crozer-Chester Medical Center, 536 F.Supp. 1065 (E.D. Pa. 1982) 7

Griffin v. Breckenridge, 403 U.S. 88 (1971) 4,8

Kubik v. New York State Department of Social Services, 244 A.D.2d 606, 664 N.Y.S.2d 365 (3d Dep't 1997) 8,9

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 113 S. Ct. 2006 (1993) 8,9

Milea v. Ames Dept. Store, Inc., 219 A.D.2d 798, 632 N.Y.S.2d 363 (4th Dept. 1995) 16

Statutes

28 USC §1257(a) 10

48 USC §1981 3,4,6,8,9

48 USC §1982 3,4,6,8,9

	Page(s)
48 USC §1983	3,5,6,9
48 USC §1985	3,4,6,8,9
CPLR §3124	10
CPLR §3211	4
CPLR §3212	10
CPLR §3214	10

STATEMENT OF THE CASE

This action arose from an incident that occurred on October 28, 1999 involving the care of a patient. Petitioner was Sheehan Memorial Hospital's ("SMH") on-call gastroenterologist ("GI") consultant on that date (R 454, 529) and responded to a code involving a patient in SMH's emergency room (R 36, 416). Although the code had ended by the time Petitioner arrived, he inquired about the status of the patient, was briefed by the emergency room physician, and expressed his opinion regarding the prerequisites for a GI procedure (R 416-417).

Later that same day, another physician, a Dr. Mitchell, called Petitioner and advised him that this patient was "bleeding all over the place" (R 57). Dr. Mitchell requested that Petitioner, the on-call GI, return to SMH to perform an "urgent endoscopy" on the patient (R 54, 414-415, 530). Petitioner refused to return to SMH to perform the procedure (R 530). Petitioner's rationale for refusing to treat the patient was that he had been called by another consulting physician, rather than the patient's primary care physician (R 509). Dr. Mitchell and another physician, Dr. Pietrak, then attended to the patient, who ultimately died (R 410).

The circumstances of the patient's care were brought to the attention of SMH's Medical Executive Committee ("the Committee"), which is a quality assurance, peer review body. The Committee is authorized to investigate allegations of physician misconduct and patient treatment and to discipline physicians, if warranted (R 239). The October 28, 1999 incident was raised in meetings before the Committee on November 16, 1999 and December 2, 1999 (R 535).

Respondents Drs. Blackwell (SMH's CEO), Maddi (SMH's Medical Director), Hassenfratz and Serghany were each members of the Committee (R 238, 387-88, 525, 531, 598).

Petitioner, Dr. Mitchell and Dr. Pietrak were each required to appear before the Committee and were provided the opportunity to present their respective statements regarding the care and treatment of the emergency room patient (R 239). Thereafter, the Committee sought to determine whether Petitioner had established a physician-patient relationship when he responded to the emergency room code, and if so, whether Petitioner subsequently terminated that relationship (R 535, 630-633).

The Committee determined by vote that Petitioner had established a physician-patient relationship with the deceased patient, but that relationship had been later terminated (R 632-633). Therefore, the Committee "decided to exonerate Dr. Williams" and to take "no course of action . . . 'except' documentation" (R 531, 632). This documentation took the form of an educational letter to Petitioner's file (R 240, 389-390, 531, 628-629, 632, 635). The educational letter, in part, stated that Petitioner should have appropriately documented his actions on the date in question, that he had not accepted responsibility for his on-call status, and that his actions in the emergency room were "clearly unacceptable" (R 144-45).

Petitioner acknowledges that no substantive action was taken against him with regard to the Committee's peer review proceeding or the educational letter (R 493, 506-507). Nonetheless, Petitioner decided on his own to discontinue affiliation with SMH (R 112).

Petitioner commenced a proceeding in New York State Supreme Court to have the educational letter expunged

from his file (R 906-907). By Decision and Order granted May 14, 2001, the Supreme Court, Erie County (Hon. J. Gorski), held that the educational letter was a nullity because it was not sent within thirty days of Petitioner's Committee hearing and was thereby sent in violation of SMH's own bylaws. Judge Gorski directed that the letter be expunged from Petitioner's file (R 896-899).

On June 26, 2001, Petitioner commenced this civil action against the Respondents seeking legal costs incurred in the proceeding to expunge the letter from his file and other monetary relief. In his complaint, Petitioner asserted three causes of action. The two that remain at issue here involve the Respondents' purportedly unfair treatment of Petitioner relative to the October 28, 1999 incident. The first cause of action alleges that the Respondents are state actors who engaged in a race-based conspiracy to deprive Petitioner of his constitutional rights in violation of 42 U.S.C. §§1983 and 1985 (R 31-43). The second alleges that the Respondents, as private citizens, engaged in a race-based conspiracy to deprive Petitioner of his civil rights in violation of 42 U.S.C. §§1981, 1982 and 1985. *Id.* The conspiracy was purportedly led by Dr. Blackwell who, like Petitioner, is African-American.

In dismissing the first cause of action, New York State Supreme Court Justice Patrick NeMoyer stated that "[a]s to the 1983 action, the Court does not find that there is any evidence that the parties have acted under State law. . . . The Court does not find that there is any evidence, any suggestion that there is any proof or allegations in the complaint where State action can properly be inferred by the Court and therefore dismisses the 1983 action." Pet., App. D at 12a.

With respect to the second cause of action, Justice NeMoyer stated that "[u]nder your position that the private conspiracy claims under 1981, 82 and 85 cannot be dismissed, I find that the criteria under Griffin v. Breckenridge, 403 U.S. 88 (1971)] have not been . . . sufficiently or adequately pled and therefore I do dismiss. Although you must establish a prima facie case based upon the allegations, I don't believe you have. Even if you had, the burden had shifted to you because of the affidavits submitted by the defendants and you have failed to respond and show that the reasons were protectural [sic]." Pet., App. D at 13a.

Justice NeMoyer also stated two additional grounds for dismissal of both conspiracy causes of action. First, "that the action of the medical executive committee is protected under New York State Education Law" and "the parties were entitled to qualified immunity based upon the action of the medical executive committee." *Id.* at 12a. Second, Justice NeMoyer found that "it has been established that [the Respondents] were one employer, one action, one conspirator" and, therefore, the intracorporate conspiracy doctrine barred Petitioner's conspiracy claims. *Id.* at 12a, 13a.

At the close of his bench decision, Justice NeMoyer dismissed the entire action against Respondents under New York's Civil Practice Laws and Rules ("CPLR") providing for dismissal of pleadings for failure to state a cause of action (CPLR 3211) *and* for summary judgment in which the moving party has demonstrated that the action has no merit as a matter of law (CPLR 3212).

Petitioner then appealed to New York State's Appellate Division, Fourth Department[1], arguing, in relevant part,

[1] Petitioner mistakenly identifies this Court as the Appellate Division, Third Department in his Petition at page 3.

that: (1) issues of fact concerning state action preclude dismissal of his claim under 42 U.S.C. §1983; (2) the complaint states a claim for a private civil rights conspiracy; (3) the Respondents are not entitled to State law immunity; (4) the intracorporate conspiracy doctrine does not act as a bar to his conspiracy claims; and (5) Petitioner should have been afforded an opportunity to conduct further discovery. The Appellate Division unanimously affirmed the judgment against Petitioner with respect to each of the questions presented. Pet., App. B.

Petitioner thereafter moved for leave to appeal to the Court of Appeals, arguing that further review of this matter was merited because the opinion of the Appellate Division raised "important questions of federal law" and because its denial of his discovery cross-motion was "unfair". In his motion for leave to appeal, Petitioner did not challenge the Appellate Division's application of state law immunity or the intracorporate conspiracy doctrine, either of which was sufficient to sustain the judgment against him in its entirety. On October 28, 2003, the Court of Appeals denied Petitioner's motion for leave to appeal. Pet., App. A.

Petitioner now petitions this Court for a writ of certiorari, asserting that the state courts erroneously applied heightened pleading and proof requirements to Petitioner's federal claims. Pet. at 13. Petitioner further contends that by denying Petitioner's cross-motion for additional discovery, "the courts below further violated [Petitioner's] civil rights." *Id.* at 22. As set forth fully below, Petitioner's arguments involve questions that were not presented or raised in the decisions below and are otherwise without merit.

ARGUMENT

POINT I

NEITHER THE RECORD NOR THE DECISIONS BELOW RAISE THE QUESTIONS PRESENTED IN THE PETITION

In his brief to the Appellate Division of the Supreme Court of the State of New York for the Fourth Judicial Department, Petitioner raised the following questions: (1) did Petitioner submit evidence sufficient to raise a question of fact as to whether Respondents are state actors, thereby precluding dismissal of his claim under 42 U.S.C. §1983; (2) did Petitioner state a private civil rights conspiracy claim under 42 U.S.C. §§1981, 1982 and 1985; and (3) did the trial court err in denying Petitioner's motion for a continuance and to conduct and compel additional discovery under the New York Civil Practice Law and Rules ("CPLR"). The Fourth Department answered each of these questions in the negative. Pet., App. B at 4a-5a.

In his first question presented here, Petitioner would have this Court consider whether his claims pursuant to 42 U.S.C. §§1981, 1982, 1983 and 1985 were dismissed because the "state courts" erroneously applied heightened pleading and proof standards in assessing his claims. There is no basis for review of this question.

With respect to his claim of a public civil rights conspiracy in violation of 42 U.S.C. §1983, Petitioner does not point to any portion of the trial court's ruling that would evidence the application of an improper standard of review on a motion to dismiss or for summary judgment. Nor did Petitioner raise such a question to the Fourth Department. Rather, it is evident from the record and the

Fourth Department's decision and order that the only question raised or passed upon in that forum with regard to Section 1983 was whether Petitioner had successfully demonstrated the existence of a genuine issue of fact as to the state action element. In response to that question, the Fourth Department stated: "[t]he individual defendants, physicians employed by SMH, established that their conduct is not 'fairly attributable' to the state (American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50, 119 S. Ct. 977 (1999)) and 'the fact that [SMH] [is] regulated by the state and receive[s] substantial public funding is, without more, woefully insufficient to impute state action to the conduct of the [moving] defendants' (Alcena v. Raine, 692 F.Supp. 261, 266). Thus, the moving defendants established that they were not acting under the color of state law . . . and plaintiff failed to raise a triable issue of fact." Pet., App. B at 4a.

Indeed, SMH has never disputed that it is regulated by the state and receives state funding. Respondents' argument throughout has been that no amount of proof with respect to these allegations is sufficient to turn a private hospital and its employees or agents into state actors. See generally, Cardio-Medical Associates v. Crozer Chester Medical Center, 536 F.Supp. 1065, 1086-94 (E.D. Pa. 1982) (collecting more than one hundred decisions and holding that neither the receipt of Medicare or Medicaid funds, the receipt of other government funds, government regulation in any degree whatsoever, nor the tax-exempt status of a hospital is sufficient to convert a private hospital's actions into actions taken under color of state law). The Fourth Department correctly agreed that Petitioner's purported facts were insufficient, as a matter of law, to impute state action to a private entity.

Similarly, on his claim of a private conspiracy in violation of 42 U.S.C. §§1981, 1982 and 1985, Petitioner does not point to any portion of the trial court's ruling that would evidence the application of an improper standard of review as to the sufficiency of his pleading. In his appeal to the Fourth Department, Petitioner merely asked the court to consider whether the complaint did, in fact, state a claim for relief under the foregoing statutory provisions. Petitioner argued that the trial court - which concluded that "there are no facts set forth here sufficient for the [c]ourt to rule. There must be more than mere speculation." Pet., App. D at 11a - simply got it wrong. In fact, Petitioner urged the Fourth Department to apply Griffin v. Breckenridge, 403 U.S. 88, 103-104 (1971) in assessing his complaint, the same standard applied by the trial court. Pet., App. D at 13a. Once again, the Fourth Department disagreed with Petitioner's assertion of error and held that: "'the conclusory, vague and general allegations of a conspiracy to deprive [plaintiff] of constitutional rights' are insufficient to support plaintiff's claim under 42 U.S.C. §1985(3) (Kubik v. New York State Dept. of Social Servs., 244 A.D.2d 606, 610)." Pet., App. B at 4a-5a. The Fourth Department also considered Petitioner's remaining contentions, including those relative to his allegations of violations of Sections 1981 and 1982, and found them to be lacking in merit without opinion. *Id.* at 5a.

While Petitioner did not raise the issue of an improper standard of review with respect to the trial court's consideration of his private conspiracy claim, he now contends that the Fourth Department erroneously applied a "heightened pleading standard" to its review of the complaint. In sum, Petitioner claims that the quotation from Kubik in the Fourth Department's order relies on Angola v. Civiletti, 666 F.2d 1, 4 (2d Cir. 1981), a decision Petitioner believes *may* be at odds with Leatherman v. Tarrant County Narcotics Intelligence and Coordination

Unit, 507 U.S. 163, 113 S. Ct. 2006 (1993). Petitioner's beliefs that Angola and Leatherman are at odds and that this creates "an issue of great significance in civil rights actions filed in state courts" (Pet. at 13) reflect an erroneous reading of those decisions and Kubik.

In the first place, contrary to Petitioner's assertion, the Kubik quotation set forth in the Fourth Department's order does not rely on Angola. While Angola is cited in Kubik, that decision (Angola) is not the basis for the quoted language, which merely espouses the well-settled principle that conclusory allegations based on surmise and speculation are insufficient to withstand a motion to dismiss. Nothing in the Fourth Department's order evidences the application of a "heightened" pleading requirement. Furthermore, Petitioner's reliance on Leatherman is entirely misplaced. Leatherman relates only to Section 1983 claims and its holding is limited to the pleading standards applicable to such claims when brought against municipalities. Petitioner's futile attempt to manufacture a question for review by suggesting that Leatherman should be broadened to cover additional statutory provisions (*i.e.*, Sections 1981, 1982 and 1985) and extended to claims against private entities and individuals must be soundly rejected.

Petitioner did not ask the Fourth Department to review the standard applied by the trial court in granting summary judgment on his private conspiracy claim and the Fourth Department's decision does not raise that question.

In the second question presented here, Petitioner asks this Court to consider whether the state courts themselves violated Petitioner's equal protection and due process rights by declining to permit him to conduct additional discovery. In addition to noting that this question was neither raised by Petitioner below nor in any decision

issued in this action, Respondents simply point out the obvious; the "state courts" are not parties to this action and this Court lacks jurisdiction over Petitioner's wild-eyed claims of constitutional violations by non-parties.

What Petitioner has objected to throughout is the trial court's opinion that there was no "additional information [ ] necessary and required before the court [could] rule on the summary judgment motion and that further delay would only serve to add additional cost to the parties ...." Pet., App. D at 10a. That decision was rendered on Petitioner's motion for a continuance pursuant to CPLR 3212(f), to compel discovery pursuant to CPLR 3124 and for an order lifting a stay on discovery imposed by CPLR 3214(b).

This Court's jurisdiction over state courts is limited to issues involving the validity of a state statute under the U.S. Constitution or laws, or "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." 28 U.S.C. §1257(a). Petitioner has never questioned the constitutionality of the CPLR or asserted any federal right to the relief sought in his discovery motion. The Fourth Department's affirmance of the trial court's ruling on Petitioner's discovery motion is purely a matter of state procedural law that raises no constitutional issue nor any other issue of significance to civil right actions filed in state courts.

The holding of the Fourth Department was proper in all respects. Moreover, the questions presented here are not raised in the record or the decisions below. In sum, there is no aspect of Petitioner's arguments that calls for a review by this Court.

POINT II

PETITIONER'S BRIEF CONTAINS MISSTATEMENTS OF FACT BASED ON WHOLLY UNSUPPORTED CONJECTURE AND SPECULATION.

Although Petitioner would like to couch his Petition as presenting questions of constitutional law, the fact is that the courts below held against him because of an utter lack of evidence in support of his claims. Petitioner's entire claim, made below and in his Petition to this Court, sets forth bold statements of "fact" that have absolutely no evidentiary support in the record other than Petitioner's own say-so. Petitioner has neither first hand knowledge of these "facts" and, in his pleadings below, was wholly unable to support them with evidence from any source whatsoever. The following are examples of Petitioner's unsupported claims:

1. PETITIONER'S LAWSUIT IS BASED ON RECKLESS AND UNSUPPORTED CLAIMS OF CONSPIRATORIAL CONDUCT BY RESPONDENTS AND OTHERS

Petitioner's lawsuit is centered on far-fetched allegations of widespread conspiratorial conduct designed to "curtail or eliminate the practices of African-American and other minority physicians at SMH and replace them with white physicians" (R 34; Pet. at 9). In his Petition, Petitioner claims that he provided sufficient evidence such that "a jury could reasonably infer from the circumstances that the alleged conspirators had a meeting of the minds and had an understanding to achieve the conspiracy's objectives." Pet. at 16: see also Pet. at 11, wherein Petitioner asserts that he "detailed the acts of each

respondent in furtherance of the conspiracy...".

Contrary to Petitioner's assertion, he presented no evidence whatsoever that any conspiracy existed against him or anyone else. At his deposition, Petitioner claimed that each of the Respondents, including SMH's African-American CEO, along with the Federal and New York State governments, were involved in this alleged conspiracy to drive out minority physicians. (R 98-103). Despite this bold statement, Petitioner was unable to provide any details about the purported conspiracy, including when and if the alleged conspirators met, what they discussed or which government officials participated in the alleged conspiracy (R 63-85).

2. CLAIMS OF DISCRIMINATORY TREATMENT AGAINST OTHER PHYSICIANS ARE UNSUPPORTED BY ANY EVIDENCE

Petitioner asserts that other physicians at SMH were discriminated against. He cites the purported incident of an Asian physician, Dr. Jin, who it is claimed was "summarily suspended" for an incident where he controlled a patient's bleeding while a white surgeon (Dr. Gage) who allowed a patient to bleed to death was not subjected to discipline. Pet. at 5.

Despite these serious claims, Petitioner failed to submit one iota of evidence of the procedures performed by these physicians or the basis for the alleged suspension of Dr. Jin. Each of the record citations offered in Petitioner's brief is to Petitioner's own statement or testimony which does not purport to be on personal knowledge. Not one witness or document was presented to support the assertion that Dr. Jin was suspended, that the alleged suspension was not warranted, that Dr. Gage performed an

unwarranted procedure or that there was any discriminatory animus in any of the actions taken against any physician.

Petitioner's claims that other minority physicians were discriminated or conspired against are equally lacking in evidentiary support. Petitioner suggests a discriminatory motive in the New York State Attorney General's investigation of one African-American physician (Pet. at 4) and in SMH's "replacement" of another African-American physician in May 1999. *Id.* at p. 10. He also asserts that the Pathology Laboratory Director, an East-Indian, was replaced after she supported Dr. Jin, an Asian. Id. Again, Petitioner supplied no documentary evidence or statements from any witnesses with knowledge to support his conclusory belief that any of these events occurred, or that they involved any conspiracy or discriminatory animus. Indeed, Petitioner acknowledged that the first physician was investigated by outside authorities, not SMH, after which a grand jury was convened and the physician was prosecuted (R 421, 474), and that illegal prescriptions were being issued on the second physician's prescription pads (R 476). Petitioner's "proof" relative to the Pathology Director consists solely of that doctor's letter acknowledging that the non-renewal of her contract was due to SMH's financial considerations (R 1142).

In short, there is absolutely no proof in the record to support Petitioner's underlying claims that there was a pattern of discriminatory or conspiratorial behavior against minority physicians at SMH. Petitioner's protestations to the contrary are based solely on his own unsupported belief, and not on any documentary evidence or the statements of any witness claiming to have first hand knowledge of the events on which Petitioner draws his conclusions of wrongful conduct.

3. PETITIONER'S CLAIM THAT THE EDUCATIONAL LETTER WAS THE RESULT OF CONSPIRATORIAL CONDUCT IS WITHOUT MERIT

Petitioner suggests that Respondents' drafting of the educational letter for his file somehow negated his exoneration for the patient's death. Pet. at 7, 11. The evidence is to the contrary. The Committee did vote to exonerate Petitioner. The Committee also decided to place an educational letter in Dr. Williams' file (R 136, 138-39, 143). The educational letter was not punitive, but alerted Petitioner to the fact that his actions were deemed unacceptable (R 144-45).

Petitioner's suggestion that the educational letter was prepared in the furtherance of a conspiracy is not borne out by the proof. Rather, the Committee decided to forward that letter to Petitioner at the same time it voted to exonerate him for the patient's death. The Committee's decision to do so was well within its authority and mandate from SMH to conduct peer review activities involving patient care. The decision was also contemporaneously documented by the Committee (R 138).

The courts below recognized that Petitioner's claims lacked any evidence to support his broad allegations of conspiracy and discrimination. Review of the record establishes that Petitioner's case is based solely on self serving speculation, innuendo and conjecture. Petitioner's proof of wrongdoing amounts to far less than the "detailed information and evidentiary support" he advises this Court was presented. Pet. at 13.

While Petitioner contends that dismissal of his case implicates issues of constitutional law, the fact is that Petitioner's case was properly dismissed for his failure to

plead a claim upon which relief can be granted as well as a failure to raise a material issue of fact sufficient to survive summary judgment. The Appellate Division's further determinations, not challenged here, that: (1) the Respondents are entitled to immunity from suit in this action; and (2) the intracorporate conspiracy doctrine bars Petitioner's claims as a matter of law, clearly support dismissal of this action in its entirety in any event.

POINT III

PETITIONER'S MOTION FOR FURTHER DISCOVERY WAS PROPERLY DENIED BY THE APPELLATE DIVISION AND TRIAL COURT BELOW.

Petitioner fails to explain why he chose not to obtain facts supporting his claims from independent witnesses, such as the minority physicians he alleges were discriminated against, during the discovery period. Petitioner had ample opportunity to subpoena these individuals and obtain information from them to support his claim, but failed to avail himself of that opportunity. New York Courts have made clear that "[s]ummary judgment may not be defeated on the ground that more discovery is needed, where, as here, the side advancing such an argument has failed to ascertain the facts due to its own inaction." Milea v. Ames Dept. Store, Inc., 219 A.D.2d 798, 632 N.Y.S.2d 363 (4th Dept. 1995).

Although Petitioner accuses the state courts of depriving him of his due process rights, the trial court acted within its discretion to consider the evidence before it and deny Petitioner further discovery. Petitioner cites no law supporting his claim that the trial court's decision falls outside of any constitutional protections due him.

For the foregoing reasons, this Court should deny Petitioner's writ of certiorari.

CONCLUSION

Petitioner has utterly failed to establish the existence of any question meriting review by this Court. The trial court and the Appellate Division both applied well-settled legal principles to the pleadings and facts of this case. The Petitioner's petition for writ of certiorari should therefore be denied.

Respectfully submitted,

By: David P. Marcus
Counsel of Record
WEBSTER SZANYI LLP
Attorneys for Respondent Joseph Serghany
1400 Liberty Building
Buffalo, New York 14202
(716) 842-2800

Michele K. Snyder, Esq.
FELDMAN, KIEFFER & HERMAN, LLP
Attorneys for Respondent
Thomas A. Hassenfratz
110 Pearl Street, Suite 400
Buffalo, New York 14202
(716) 852-5875

Judy S. Hernandez, Esq.
DAMON & MOREY, LLP
Attorneys for Respondents Joseph Maddi,
Olivia Blackwell and Sheehan Memorial
Hospital
1000 Cathedral Place
298 Main Street
Buffalo, New York 14202
(716) 856-5500